Office-Supreme Court, U.S.
FILED
SEP 9 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted]368

ANTHONY P. MILLER, INC. and
NEW AMSTERDAM CASUALTY CO.,
Petitioners,

v.

WALTER S. KOZDRANSKI CO., INC.,
AMERICAN HOUSES, INC.,
RAY BURROUGHS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF ON BEHALF OF WALTER S. KOZDRANSKI CO., INC., AMERICAN HOUSES, INC., AND RAY BURROUGHS, RESPONDENTS

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF ON BEHALF OF WALTER S. KOZDRANSKI CO., INC., AMERICAN HOUSES, INC., AND RAY BURROUGHS, RESPONDENTS

I.

Insufficiency of Petition.

The petition herein fails to demonstrate compliance with either Rule 19, 1(a), or Rule 23, 1(f) of the Supreme Court Rules by setting forth any Federal question of substance decided by the state courts adverse to the decisions of this Court.

Contrary to the assertion of petitioners, neither the Supreme Court at Trial Term, the Appellate Division of the Supreme Court, nor the Court of Appeals of the State of New York were requested to or did pass upon any alleged infringement of the Federal constitution, treaties or statutes. At no time subsequent to the filing of the mechanic's liens herein, and prior to June 5, 1964, did petitioners or any other party move to vacate the liens or raise any question as to the jurisdiction of the state court to hear and determine these actions upon their merits. No motion was ever made on behalf of the petitioners either before or during the trial, or in the appellate courts, to dismiss these claims for want of state court jurisdiction, or because of a claimed invalidity of the liens.

Such contention never was advanced until after complete exhaustion of petitioners' rights in the New York courts. This is established by the words of petitioners' trial counsel. Printed as Appendix A is an affidavit of that counsel submitted in a futile attempt to secure a stay of execution subsequent to denial by the Court of Appeals of the State of New York for leave to appeal, in which he avers "that it had recently come to our attention" that jurisdictional questions existed (Appendix A, p. 15). In the fact of such concession, it is difficult to see how it can be claimed that any question arising under the Capehart Act, the Miller Act or the interrelation between them, could have been raised in or decided by the trial Court at first instance, or any appellate Court as required by Rule 23, 1(f) of this Court for grant of certiorari.

In the words of Mr. Justice Sanford in *Mellon v. O'Neil*, 275 U. S. 212, 214-215 (1927):

> "It has long been settled that this court acquires no jurisdiction to review the judgment of a state court

of last resort on writ of error, unless it affirmatively appears upon the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court. Whitney v. California, 274 U. S. 357, 360 71 L. ed. 1095, 1099, 47 Sup. Ct. Rep. 641; and cases cited. It is not enough that there may be somewhere hidden in the record a question which if it had been raised would have been of a federal nature.

II.

No question of substantial public concern is presented.

In both *United States of America for the use and benefit of Miles Lumber Co. v. Harrison & Grimshaw Construction Co.*, 305 F. 2d 363 (C. A. 10th, 1962), *Cert. denied* 371 U. S. 920 (1962) and *United States of America for the use and benefit of Robertson Lumber Co. v. Continental Casualty Co.*, 305 F. 2d 794 (C. A. 8th, 1962, *cert. denied* 371 U. S. 922 (1962), the provisions of the Miller Act, 40 U. S. C. § 270 (49 Stat. 794) were held not to be applicable to a housing project under the Capehart Act, 42 U. S. C. § 1594 (69 Stat. 646; 70 Stat. 1019; 70 Stat. 1109). In addition, in *Miles Lumber, supra*, the Circuit Court specifically held:

> "Those furnishing labor and materials during project construction may assert liens under state law against the property." (305 F. 2d at 366-367.)

In each of those cases an attempt to obtain review by this Court upon the ground of conflict between circuits was made by certiorari was nevertheless denied.

The procedure followed by the respondents herein in filing liens and prosecuting actions against the petitioners herein was entirely proper. The liens were filed against interests of private corporations then controlled by Miller

and did not purport to affect the interests of the United States.

That a Capehart project is not a "public work" is in accord with the decision of this Court in *Armstrong v. United States,* 364 U. S. 40, 42 (1960):

> "We cannot agree that a mere prospect that property will later be owned by the United States renders that property immune from otherwise valid liens."

The cessation by Congress in 1962 of further appropriations to finance Capehart Act projects warrants the assumption that little, if any, further litigation involving these projects will arise and that the public interest accordingly does not merit a grant of certiorari in this case by this Court.

III.

The parties effectually waived any disputes clause procedure.

The petition herein erroneously infers (p. 15) that respondent Kozdranski was a party to two appeals before the contracting officer. Kozdranski was not a party to these appeals. Neither Kozdranski, American Houses, nor Burroughs were parties to any appeals before the contracting officer.

Persuasive argument could be made that a contracting officer, as to disputes between a contractor and sub-contractor, is without jurisdiction. [*cf. Fanderlik-Locke Co. v. United States of America for the use of M. B. Morgan,* 285 F. 2d 939 (C. A. 10th, 1960), where the subcontractor was stated to have no standing before the contracting officer; *Wymard v. McCloskey & Co.,* 190 F. Supp. 420 (E. D. Pa.,

1960) *aff'd* on opinion below, 292 F. 2d 839 (C. A. 3rd, 1961), where the contracting officer refused to arbitrate such a dispute.] Such an argument is not essential to the determination of this issue as to Kozdranski, and no issue is presented by this record which would have involved either American Houses or Burroughs and the contracting officer (R. 35).

As between contractor and sub-contractor the contracting officer is at best an arbitrator, since no interest of the United States is impinged upon by a question involving breach of contract between those parties. It has long been settled that where the defendant pleads only to the merits in a suit for damages, such action constitutes a waiver of the right to arbitration. *American Locomotive Co. v. Chemical Research Corporation*, 17 F. 2d 115 (C. A. 6th, 1948) *cert. denied* 336 U. S. 909; *United States of America for the use and benefit of Frank A. Trucco & Sons Co. v. Bregman Construction Corp.*, 256 F. 2d 851 (C. A. 7th, 1958) (involving the Miller Act). Petitioners pled only to the merits and thereby waived any right to arbitration (R. 58-78; 104-106). See: *E. I. duPont deNemours & Co. v. Lyles & Lang Const. Co.*, 219 F. 2d 328 (C. A. 4th, 1955), *cert. denied* 349 U. S. 956 (1955) where it was held that resort to the standard disputes clause was waived by a plea to the merits and assertion of a counter-claim. Nothing contained in *United States v. Taylor*, 333 F. 2d 633 (C. A. 5th, 1964), cited by petitioners, is inconsistent with this for there the factual dispute was submitted to arbitration.

The law of the State of New York is in accord, *Gold Plastering Co., Inc. v. 200 East End Avenue Corp.*, 282 App. Div. 1073, *aff'd* 307 N. Y. 668 (1954).

Accordingly, the contention that resort to the disputes clause was a jurisdictional prerequisite to a suit by these sub-contractors is without merit.

IV.

An independent state ground exists which fully supports the judgment granted.

The complaint of the respondent Kozdranski and the answers and cross actions of the respondents American Houses and Burroughs, in substantially similar language, sought relief:

> "4(e) That if plaintiff shall fail, for any reason, to establish a valid lien herein, it recover judgment for such sums as are due it, or for which it might recover in an action on a contract, against defendant Anthony P. Miller, Inc." (R. 57-58, 94, 102.)

Such relief is specifically authorized by New York statute law. Section 54 of the New York Lien Law provides:

> "If the lienor shall fail, for any reason, to establish a valid lien in an action under the provisions of this article, he may recover judgment therein for such sums as are due him, or which he might recover in an action on a contract, against any party to the action."

The judgment entered (R. 9) granted such personal judgment and in fact, the opinion of the Trial Justice specifically limited a substantial portion of the Kozdranski claim to a personal judgment against Miller for breach of contract (R. 19).

There was a direct contractual relationship between each of the respondents and petitioner Miller (R. 47, 51, 53, 55, 88, 97-98) and, therefore, it cannot be disputed that each was entitled to sue Miller for breach of contract in the New York courts. Such relief was pleaded, demanded,

granted and upheld on appeal (R. 47-48, 51-52, 53-54, 55, 88-90, 97-99, 57-58, 94, 102, 28, 35, 40-41, 14-15; Petition 18-20).

Accordingly, the judgment sought to be reviewed is valid on state grounds, entirely independent of any asserted Federal question. Under those circumstances this Court has repeatedly held that it is without jurisdiction to review. *Durley v. Mayo*, 351 U. S. 277 (1956); *Stembridge v. State of Georgia*, 343 U. S. 541 (1952), and cases therein cited.

V.

The equities require denial of the petition.

The issues between the parties were accorded a full and fair hearing by the Supreme Court at trial term and were reviewed on appeal by the Appellate Division, Fourth Department, both upon the law and the facts and unanimously affirmed (R. 19-41, Petition 18-19). The New York Court of Appeals could perceive no error of law which required its review (Petition 20).

To hold that the exclusive remedy available to these respondents was by action on the Capehart bond would be to leave them without relief in view of the one year limitation for action contained therein, despite the unanimous opinion of the New York courts that the respondents were entitled to recover more than $100,000.00 as damages for breach of their contracts.

The New Jersey Supreme Court was recently confronted with a precisely similar situation in *Minneapolis-Honeywell Regulator Co. v. Terminal Construction Corp.*, 41 N. J. 500, 197 A. 2d 557 (1964), in which it specifically overruled its previous decision, cited by petitioners, in *Gypsum Con-*

tractors Inc. v. American Surety Co., 37 N. J. 315, 181 A. 2d 174 (1962), and held the Miller Act inapplicable.

It is respectfully submitted that the equities require that the respondents not be left without just compensation.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

STATE OF NEW YORK
SUPREME COURT—NIAGARA COUNTY

—o—

WALTER S. KOZDRANSKI CO., INC.,
Plaintiff,

vs.

ANTHONY P. MILLER, INC. and NEW AMSTERDAM CASUALTY COMPANY,
Defendants,

and

NIAGARA FALLS A. F. B. HOUSING, INC., NIAGARA FALLS A. F. B. HOUSING NO. TWO, INC., ALBERT AMATO ELECTRICAL CONTRACTING CORP., AMERICAN HOUSES, INC., RAY BURROUGHS, THE COMPTROLLER OF THE STATE OF NEW YORK, As trustee of the NEW YORK STATE EMPLOYEES RETIREMENT SYSTEM,
Defendants.

—o—

State of New York,
County of Erie,
City of Buffalo. } ss.:

FRANK G. GODSON, being duly sworn, deposes and says:

That he is an attorney associated with the firm of Smith, Murphy & Schoepperle, attorneys for the defendants Anthony P. Miller, Inc. and New Amsterdam Casualty Company in the above entitled action, and has been in charge of said action for deponent's office since early 1961.

That this action was brought by the plaintiff to enforce four mechanics liens upon property in the Town of Niagara, Niagara County, New York, as described in detail in the complaint of said plaintiff. Being an action for lien fore-

closure Kozdranski joined as parties defendant all other parties asserting liens or interest in the premises. These parties included American Houses, Inc. and Ray Burroughs, who in their answers to the complaint also asserted liens against the property. Beside demanding lien foreclosure, personal judgment against defendant Anthony P. Miller, Inc. was requested by plaintiff and the two said defendants.

This action came on for trial before Honorable John S. Marsh of this Court on April 16th, 1962 and resulted in a Judgment under date of August 23rd, 1962 enforcing said liens in favor of plaintiff and defendants American Houses, Inc. and Ray Burroughs.

This Judgment, and Order filed September 24th, 1962 were appealed to the Appellate Division, Fourth Department, which Court affirmed the Judgment and Order of the Lower Court without opinion. A motion was made to the Appellate Division for leave to appeal to the Court of Appeals, and this motion was denied without opinion on January 15th, 1964. A further motion was made to the Court of Appeals for leave to appeal to said Court, and this motion was denied in a Judgment dated May 11th, 1964.

By Show Cause Order dated June 5th, 1964, a motion was made to this Court for a stay of execution of the outstanding Judgments on the ground that it had recently come to our attention that there are Statutes forbidding a foreclosure action in the situation involved in this case and hat therefore the New York Courts are complefely without jurisdiction to render the Judgments which are presently on record. The motion was heard this Court on June 11th,

1964, and the merits of the jurisdictional issues were argued before the Court, which denied our motion for stay of execution on the ground that these matters were "*res adjudicata*".

It appears therefore that our sole means of raising the jurisdictional questions is by Certiorari to the United States Supreme Court, since our State remedies seem to have been exhausted. We are presently preparing an application for Certiorari pursuant to Section 2101 (c) of title 28 U. S. C. A., and are by this motion applying for a stay of execution pursuant to Sub-Section (f) of the same Section. Deponent is sincerely of the opinion that substantial Federal questions are involved in this case which deserve review by the Supreme Court, particularly as follows:

1. The Judgment in this case, in form at least, orders foreclosure of liens against property admittedly owned by the Government of the United States. Although the liens have been bonded off, this does not change the essential nature of the action or give the plaintiff any additional rights. *Spitz v. Brooks*, 210 App. Div. 438; *Van Den Driesch v. Rohrig*, 45 App. Div. 526; *Parsons v. Moses*, 48 App. Div. 58; *Pittsburg Plate Glass v. Vanderbilt*, 143 N. Y. S. 609.

2. The United States Government cannot be sued for foreclosure of real property owned by it. *United States vs. Ansonia Brass & Copper Co.*, 218 U. S. 452, 54 L. Ed. 1107, 31 S. C. 49. The only Statute under which the United States has consented to be sued in a lien foreclosure case is 26 U. S. C. A. 2410 which limits it to situations where the United States has a lien against property, and

requires certain formalities which were obviously not followed in this case.

3. The sole remedy available to the claimants under the facts involved in this case is by an action on the payment bond, as prescribed by the Capehart and Miller Acts. The obvious purpose of those Statutes was to prescribe the procedure to be followed by laborers and material men on Government projects where the assertion of liens is forbidden because of the immunity of the United States from such suits. *National State Bank of Newark v. Terminal Construction Corp.*, 317 Fed. Sup. 341; *United Pacific Co. v. United States*, 319 Fed. 2d 893.

4. The Capehart and Miller Acts grant no jurisdiction to the State Courts in such cases, but instead the laborers and material men must bring their actions in the United States District Court. *Travis Equipment Co. v. D & L Construction Co.* (Nov. 1963), 224 Fed. Sup. 410, at 417; *Gypsum Contractors, Inc. v. American Surety Co.*, 37 N. J. 315, 181 A. 2d 174.

The Courts in New York State have upheld the procedure followed by the plaintiff and the other lienors. It is our contention that this procedure is totally outlawed by the Statute under which this project was let, and by the admitted immunity of the United States Government from actions of this type.

At the very least, we feel that Justice requires that we be given a stay of execution with appropriate security to the judgment creditors as directed by the Court, until the Supreme Court of the United States has determined whether or not it wishes to review what has been done in this case.

WHEREFORE, deponent prays that an order be made directing that execution under the Judgments, and that any other steps to enforce these Judgments be stayed until the determination of our application for Certiorari and that the substitution of appropriate bonds in the amounts to be determined by the Court for the appeal bonds now on file be permitted.

FRANK G. GODSON.

Sworn to before me this
12th day of June, 1964.
Mary C. Lewis,
Notary Public, Erie County.
My Commission Expires 3/30/65.